

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	
JOHN WASHINGTON,	:
	:
Petitioner,	:
	:
-against-	:
	:
ROBERT ERCOLE,	:
	:
Respondent.	:
-----X	

GOLD, S., U.S.M.J.:

ORDER
CV-08-4835 (NGG)

John Washington filed a petition for habeas corpus in November, 2008.¹ Washington has filed an unopposed motion to stay his habeas petition to pursue collateral proceedings in state court, alleging that his trial counsel was ineffective for failing to object to a lineup with respect to differences in body type and skin tone. Docket Entry 6.²

In ruling on petitioner's motion for a stay, I must undertake an analysis of the merits of the claim. *Rhines v. Weber*, 544 U.S. 269, 277, 125 S. Ct. 1528, 1535 (2005) (holding that it would be an abuse of discretion to grant a stay when the unexhausted claims are "plainly meritless"). Respondent, however, did not provide a copy of the videotape or still photographs of the lineup with his production of the state court trial record. I am therefore unable to assess whether petitioner's contention that his lineup was unduly suggestive – because fillers had different body types and skin tones than petitioner – is "plainly meritless." Accordingly, respondent is directed to produce copies of any videotapes and photographs of the lineup no later

¹ The Honorable Nicholas G. Garaufis has referred the habeas petition to me for a report and recommendation. Docket Entry 7.

² At the lineup, petitioner's trial counsel did object to differences in hair between fillers and Washington.

than May 15, 2009.

So Ordered.

/s/

Steven M. Gold
United States Magistrate Judge

April 27, 2009
Brooklyn, New York